Supreme Court, U. S.
FILED
JAN 21 1980
MICHAEL RODAK, JR., CLERK

TO THE SUPREME COURT OF THE UNITED STATES

No. 79-1130

MICHAEL GEORGE THEVIS and
ANNA JEANETTE EVANS,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari

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JURISDICTIONAL STATEMENT

Opinions Below:

The opinion of the District Court was rendered on March 30, 1979, and is reported at 469 F.Supp. 490 (D. Conn.). This opinion and judgment was in the form of denial of motions by THEVIS and EVANS to suppress evidence and certain statements made by them. They then pled guilty, reserving their right to appeal, a practice approved in the Second Circuit.[1]

The Circuit Court affirmed "substantially for the reasons stated in Judge Clarie's excellent opinion ..." The Circuit Court further stated that it had considered *Dunaway v. New York*, (___ U.S. ____, 99 S.Ct. 2248 - June 5, 1979), and "heavily relied upon by appellant, and we do not believe that this decision requires a contrary result. *Cf. Brown v. Texas*, (___ U.S. ____, 99 S.Ct. 2637 - June 25, 1979)." [Opinion, Exhibit "A" to Appendix]

Thevis and Evans filed petitions for rehearing, and also suggestion of propriety of *en banc* consideration (Exhibit "B" to Appendix). This petition and this suggestion were denied on December 18, 1979 (Exhibits "C" and "D" to Appendix). Petition for stay of mandate has been filed.

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[1] See e.g., United States v. Rothberg, 480 F.2d 534, 535 (2d Cir., cert. den., 414 U.S. 856 (1973); United States v. Doyle, 348 F.2d 715, 719 (2d Cir. 1965); United States v. Faraolo, 506 F.2d 490, 491, n. 2 (2d Cir. 1975); United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. Coyne, 587 F.2d 111, 115 (2d Cir. 1978); United States v. Vanquez-Santiago, ___ F.2d ____, No. 78-1418 (2d Cir. July 12, 1979).

Jurisdiction:

This Court has jurisdiction to entertain this writ of certiorari under the provisions of 28 USCA 1254.

Questions Presented:

(1) Did the Circuit Court apply the proper test for considering the "legality of custodial questioning on less than probable cause for a full-fledged arrest"? *Dunaway v. New York*, ____ U.S. ____, 99 S.Ct. 2251 (1979).

(2) Was it proper to consider the admissibility of defendants' statements solely under *Miranda v. Arizona*, 384 U.S. 436 (1966), and without including consideration of *Brown v. Illinois*, 422 U.S. 590 (1975), that whether the making of such statements was rendered infirm by the illegal arrest?

Statement of the Case:

This is the chronology of the facts relevant to the issue here made:

On September 20, 1978, a man who identified himself as "Arby J. Evans" and who gave his address as 19 Hill Farm Road, Bloomfield, Connecticut, opened an account at the Bloomfield State Bank. On October 13, 1978, "Evans" transferred an additional $30,000.00 by mail from his account on a South Carolina bank. The State Bank feared "check-kiting", and decided not to honor the draft until it cleared.

The Bank President contacted the local police and the F.B.I. His apprehension was heightened because "Evans" had used a North Carolina driver's license as identification in opening the account, and the "starter" check was drawn on a South Carolina bank. He could find no telephone number for "Arby J. Evans" in Connecticut, or in North or South Carolina. The F B.I. reported back that there was an Arby J. Evans in Mebane, North Carolina, who had no known criminal record, and that Arby J. Evans had sufficient funds in the South Carolina bank. On October 24, 1978, the check cleared, and the Bloomfield State Bank credited the account of Arby J. Evans for the full amount (469 F.Supp. at 496).

On November 8, 1978, "Evans" came to the State Bank and requested a withdrawal, to be made on the following day at 9:30 a.m., of $31,000.00 in cash.

The Bank President was apprehensive that the "Evans" who was to withdraw the money might not be the "Evans" who owned the account. He again contacted the local police and F.B.I. The local police went to 19 Hill Farm Road. There was nobody at home, but they found a letter addressed to a person named Rifkind. The local post office revealed, upon inquiry by the Bank, that "Evans" had received mail from the Connecticut Bank & Trust Company (of Bloomfield). That Bank informed the State Bank that "Evans" had an account there, from which he was to withdraw $55,000.00 on November 9, 1978.

The testimony did not show whether or not the correspondence from the Connecticut Bank & Trust Company to "Evans" was addressed to him at 19 Hill Farm Road; but the local police officers learned, on the afternoon of November 8, 1978,

from a director of the State Bank who resided on Hill Farm Road, that "Evans" had in fact purchased this property from the Rifkinds. F.B.I. Agent Foster was apparently not given this information.

The information that "Evans" proposed to also withdraw $55,000.00 from the other bank "just looked funny" to Bank President Gozzo "even if it belonged to him" (Tr. 630). There was no other suspicion of these withdrawals (Tr. 631).

Bank President Gozzo, the local police, and F.B.I. Agent Foster arranged to meet at the Bank prior to the time "Evans" got there the following morning at 9:30 to pick up his money. They planned to have Gozzo take "Evans" into his private office to wait for the money to be counted. The officers would interrogate him as to his identity while Gozzo ostensibly left to get the money (Tr. 627).

"Evans" arrived at the Bank at 9:20 a.m., filled out the withdrawal check, and provided identification. Pursuant to the prior plan, "Evans" was taken into the bank president's office, the door was closed, president Gozzo left, and "Evans" was confronted by two local police officers and Agent Foster of the F.B.I., who identified themselves (Tr. 642).

"Evans" expressed surprise that the F.B.I. officer was there and asked "Do I need an attorney?" (Tr. 643). He asked if the problem was that the check had not cleared, and Foster replied that, whether it had or not, there were questions as to his identity. Foster's prior investigation (above) had shown that there was an Arby J. Evans in Mebane, North Carolina. He asked "Evans" for suggestions of someone from there who would vouch for his identity, but "Evans" declined to do so.

Officer Beatty told Foster that Arby J. Evans was a personal friend of the Mebane (North Carolina) Town Manager, Virginia Whitfield. Foster asked "Evans" if he knew the town manager, and his reply referred to the manager as a *man* rather than a *woman* (Tr. 129). The police placed a call to her and handed the 'phone to "Evans" so that he might speak to her. After "Evans" returned the receiver to Beatty, Mrs. Whitfield stated to Beatty that this was not the Arby J. Evans she knew. It was then about 9:40 a.m.

Bank President Gozzo went outside while the officers were questioning "Evans", and telephoned his office that there was a lone female in a car parked in the bank parking lot, and that the car had South Carolina registration plates. This was at approximately 9:45 a.m. Foster and Beatty left "Evans" with Officer Toce and went to the vehicle. The woman was in the driver's seat. Foster and Beatty identified themselves and asked to see her driver's license. She produced a Georgia license in the name of Anna Jeanette Evans. Foster asked if she were related to a man inside the bank. She stated that she was alone, knew no one in the Bank, and knew no person named Arby J. Evans, even though Foster told her that Mr. Evans had a bank account in South Carolina, their names were the same, and the car had South Carolina license plates (Tr. 139). Beatty asked for the car's registration, which she did not produce. When Foster further pressed her on the similarity of their names, she admitted that she knew him, stating that she had come from her home in Atlanta two weeks previously for a "fling" and met him in a saloon in Charleston, South Carolina. When Foster observed that Atlanta, rather than Charleston, might be a more credible situs for "action", she changed her story and said that the man in the bank was her husband of eight years.

Foster, noticing luggage in the rear seat of the car, asked Evans if it were hers, and she responded that it was. Some of the luggage bore the initials "J.E.", but others had Eastern Airlines stick-on name tags of "Sally Green". Foster asked her who Sally Green was, and she declined to answer further questions (Tr. 143). Foster then asked her to go with them to the Bank.

After Foster and Beatty had left for the parking lot, Officer Toce asked "Evans" for further identification, and after receiving his wallet, looked at various things in it and began to copy information therefrom; whereupon "Evans" told him he had no right to do this, and took his wallet back (Tr. 794).

Foster and Beatty took Jeanette Evans to the Bank into the presence of Toce and "Arby J. Evans". He stated "I'm sorry that I had to involve you as my sister", and she agreed that she was, but said that she had been nervous and had told the officers that she was his wife. Foster continued questions regarding their relationship, her identification, and the names of her children, etc. This continued for five or ten minutes, at which time "Arby J. Evans" asked if they were under arrest. Foster replied that they were not, but that they were not free to leave (Tr. 660); and that all would have to go to the Bloomfield Police Station, where they arrived about ten o'clock.

Questioning of defendants continued at the Bloomfield Police Station, regarding their identity, their purpose in Bloomfield, the sources of their money, their plans of employment, etc. (Tr. 40). The police obtained from the Mebane Town Manager the telephone number of Mrs. Arby J. Evans of Mebane, North Carolina, and called her outside defendants' presence, informing her that they would like her help in identifying a man and woman they were holding. They then asked "Evans"

if he would speak to the real Mrs. Evans, to which he agreed (Tr. 159). When asked his identity, she said she was too upset, and hung up (Tr. 160). The officers made a similar call to one Jimmy Jobe of Mebane, who stated that the person speaking to him was not Arby J. Evans of Mebane (Tr. 51, 52).

At approximately 10:20 defendant "Arby J. Evans" demanded an attorney. From 10:20 to 10:45, Foster learned that the car occupied in the parking lot by Anna Jeanette Evans had been purchased from the dealer whose sticker was on the vehicle by one "Arby J. Evans".

At approximately 2:00 o'clock p.m., Foster received word from another F.B.I. agent that "Arby J. Evans" might in fact be Michael G. Thevis. Foster procured a "wanted" poster and confronted him with it, whereupon he admitted that he was Michael George Thevis.

Foster asked if explosive devices were in the car but Thevis informed him that there was nothing in the car that would hurt anyone; that there was only half a million dollars in cash and a million in jewelry.

The officers demanded the keys to the car, and another F.B.I. officer drove it to the Federal Building.

ARGUMENT

The "Statement of Facts" of the opinion regarding grounds of suspicion are convoluted:

It includes as grounds of suspicion for detention of November 9, 1978, those which had been dispelled when the $30,000.00 check of October 13, 1978, had proved good on October 24, 1978, when the bank credited his account in full (469 F.Supp. at 495, 496). The chronology is incorrect: It includes Gozzo's learning that "Evans" did not live at 19 Hill Farm Road [which (erroneous) information was not furnished until November 8, 1978] with that received on October 13, 1978, regarding the fact that this $30,000.00 "starter" check was drawn on a South Carolina bank and his failure to find a telephone number for "Evans", and the F.B.I. investigation thereof between October 13 and October 24, 1978 (469 F. Supp. at 496).

The fact resume of check-kiting methods and Thevis' identification of himself as Arby J. Evans, when in fact he was "one of the FBI's ten most-wanted fugitives" over-sensationalizes and discolors the actual facts known as a basis of suspicion: The prior F.B.I. investigation had dissipated suspicion of check-kiting. The $30,000.00 check had been signed by the owner of the account. There was not even any pretense that the $31,000.00 check signed by "Arby J. Evans" to withdraw the cash on November 9, 1978, was not the same signature as that on the check which deposited the $30,000.00 and the $3,000.00 initial deposit. The actual iniquity here claimed is that Thevis handled his money under a name other than his own. His identity as "one of the FBI's ten most wanted" was not suspected until hours after his arrest.

The District Court decision (adopted by the Circuit Court) discussed the principle of "probable cause to arrest" under *Terry* and subsequent cases (469 F.Supp. 500-505) separately and distinctly from its discussion of "admissibility of defendants' statements" under *Miranda* (469 F.Supp. 505-509). The opinion did not recognize the principle of *Brown v. Illinois*, 422 U.S. 590 (1975), that *Miranda* warnings themselves "do not alone sufficiently deter a Fourth Amendment violation" (422 U.S. at 601); *Dunaway v. New York*, ___ U.S. ____, 99 S.Ct. at 2258-2259 (1979). The opinion itself was divided accordingly, and the two concepts discussed as if unrelated.

This calculated structure of the opinion indeed encapsulates Fourth and Fifth Amendment rights independently and separately without any hint that the Fifth is only a "'threshold requirement' for Fourth Amendment analysis". *Brown*, above, 422 U.S. at 604; *Dunaway*, above, ___ U.S. ____, 99 S.Ct. at 2259.

One illustration is this: When the police asked "Arby J. Evans" (Thevis) if he knew the Town Manager of Mebane, North Carolina, his response that he knew "him" (actually a *Mrs.* Whitfield) was held inadmissible "in assessing probable cause" (469 F.Supp. at 504, n. 2). However, his telephone conversation with this town manager, contrived by the officers to demonstrate this same falsity, was held admissible under *Miranda* and its progeny (469 F.Supp. at 507).

"(T)he *MIRANDA* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Brown*, 422 U.S. at 603 (Div. 5 of opinion).

Then, in applying the "probable cause to arrest", a "balancing" test was applied which over-emphasized the *Terry* concept:

"The rationale *[Terry]* ... is not limited to situations where police officers have reason to believe the individual may be armed" (469 F.Supp. at 500).

"The reasonableness of the officers' conduct must be measured by *balancing* the need for the stop against the gravity of the invasion of personal security..." (469 F.Supp. at 501) (emphasis added).

"(A)sking Thevis to step into the bank president's office in order to confirm his identity was a very *minimal intrusion*" (469 F.Supp. at 501) (emphasis added).

"The facts known to the officers on the morning of November 9, 1978, when Thevis first entered the bank were certainly sufficient to justify a *brief detention* for the purpose of establishing his identity" (469 F.Supp. at 501) (emphasis added).

"As with another defendant who was held to have been subjected to a *Terry-style stop* rather than a full arrest, she was 'politely requested to accompany the officers to a private room ..." (469 F.Supp. at 502) (emphasis added).

"(T)he officers' *brief investigatory stop* even when there was no probable cause to believe that a crime had been committed, the *Terry* court did not intend that the police could circumvent the probable cause requirement *completely* ...." (469 F.Supp. at 503) (emphasis added).

The opinion classified the officer's interrogation of defendant *Evans* in the parking lot as only a *Terry*-type, non-custodial, stop. (469 F.Supp. at 506, Divs. 19-20): "'(c)ustody' and 'arrest' are separate and discrete concepts. One may be in custody for *Miranda* purposes - that is, not free to leave - and still be in a state of detention which rises only to the level of a *Terry* stop rather than a full arrest. The Supreme Court, in *Morales v. New York*, 396 U.S. 102 (1969), by deciding the case on a narrower ground, avoided grappling with the 'question of the legality of custodial questioning on less than probable cause for a full-fledged arrest'. *Id.*, at 105-106). The issue is presently pending before the Supreme Court in *Dunaway v. New York* ...." (*Id.*, note 6, p. 506).

When the Circuit Court adopted this opinion it added only that it was not inconsistent with *Dunaway* (___ U.S. ____, 99 S.Ct. 2248).

Based upon the foregoing, the concept of isolating the Fourth Amendment is so contrary to *Brown* and *Dunaway* (above) that it requires consideration.

The search warrants, also held to be valid, are considered independently. If *Brown*, *Dunaway*, and their precursors have the meaning argued above by petitioners, this is improper.

REASON FOR GRANT OF CERTIORARI:

In adopting the opinion of the District Court, the Circuit Court adds only that it is not inconsistent with *Dunaway*.

Several factors suggest the propriety of a closer look at the District Court opinion:

(1) It was rendered prior to this Court's decision in *Dunaway*.

(2) The format of the opinion was a rigid adherence to separate consideration of "probable cause to arrest" (469 F.Supp. 500-505), "admissibility of defendants' statements" (469 F.Supp. 505-509), and "admissibility of evidence received" (469 F.Supp. 509-512). This, together with the great emphasis in the opinion of *Terry* ("Argument", above), reflects inadequate consideration of the connection and interdependence of Fourth and Fifth Amendment rights further explained in *Dunaway*, and particularly in Part III, ___ U.S. ____, 99 S.Ct. 2258, et seq.

(3) The expression that a person might be "in a state of detention which rises only to the level of a *Terry* stop, rather than to a full arrest" and its reliance upon *Morales v. New York*, 396 U.S. 102, as presenting only a narrow ground (469 F.Supp. at 506, note 6) does not update to the *Dunaway* explication.

(4) The conclusion that *Massachusetts v. White*, ___ U.S. _____, 99 S.Ct. 712 (1979), yet left open the question of whether tainted allegations in the warrant affidavit might be used to establish probable cause to search (469 F.Supp. at 511, note 17) is an inadequate consideration of the *Dunaway* explication of the connection between Fourth and Fifth Amendment rights.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari for review, upon the questions presented.

Respectfully,

COOK & PALMOUR,

Attorneys for Petitioners

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CERTIFICATE OF SERVICE

I have served the foregoing application for writ of certiorari with Appendix upon the United States, by mailing three signed copies of same to Mr. Wade H. McCree, Solicitor-General, Department of Justice, Room 5614, Washington, D.C. 20530, and by mailing a copy of same to Mr. Richard Blumenthal, United States Attorney, 270 Orange Street, New Haven, Connecticut 06510.

This 17 day of January, 1980.

Counsel for Petitioners

APPENDIX

EXHIBIT "A"

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of November, one thousand nine hundred and seventy-nine.

Present:

Honorable Wilfred Feinberg
Honorable Walter R. Mansfield
Circuit Judges
Honorable Jacob Mishler
Ch. District Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- MICHAEL GEORGE THEVIS and ANNA JEANETTE EVANS, Defendants-Appellants	)	79-1251 79-1255

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED substantially for the reasons stated in Judge Clarie's excellent opinion, reported at 469 F. Supp. 490 (D. Conn. 1979). We have considered Dunaway v. New York, 47 U.S.L.W. 4635 (U.S. June 5, 1979) decided after the district court's opinion and heavily relied upon by appellant, but we do not believe that this decision compels a contrary result. Cf. Brown v. Texas, 47 U.S.L.W. 4810 (U.S. June 24, 1979).

/s/ Wilfred Feinberg
WILFRED FEINBERG

/s/ Walter R. Mansfield
WALTER R. MANSFIELD,
Circuit Judges

/s/ Jacob Mishler
JACOB MISHLER, Ch. District Judge

APPENDIX

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	)	
PLAINTIFF-APPELLEE	)	
v.	)No. 79-1251	
ANNA JEANETTE EVANS,	)	
DEFENDANT-APPELLANT	)	Consolidated
	)	on
UNITED STATES OF AMERICA,	)	Appeal
PLAINTIFF-APPELLEE	)	
v.	) No. 79-1255	
MICHAEL GEORGE THEVIS,	)	
DEFENDANT-APPELLANT	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING, AND
SUGGESTION OF PROPRIETY OF
HEARING EN BANC

Defendants-Appellants Evans and Thevis petition this Court for rehearing in the above-stated appeals; and respectfully suggest that it

would be appropriate that the Court as a whole consider the matter:

(1) This Court has misapprehended the Supreme Court decision in *Dunaway v. New York*, ____ U.S. _____, 99 S.Ct. 2248 (1979), which it cited in its opinion.

This Court's opinion held that "...(W)e do not believe that this decision *(DUNAWAY)* compels a contrary result. *Cf. Brown v. Texas*, 47 U.S.L.W. 4810 (U.S. June 24, 1979)."

This Court affirmed for the reasons stated by the District Court.

The District Court opinion (accepted by this Court) is contrary to *Dunaway* because it failed to recognize *Dunaway's* restricted interpretation of *Terry v. Ohio*, 392 U.S. 1 (1968) and *Brown v. Illinois*, 422 U.S. 490 (1972); and the enunciation of the question reserved in *Morales v. New York*, 396 U.S. 102 (1969), *e.g.*, "the question of the legality of custodial questioning on less than probable cause" (*Dunaway*, ____ U.S. ____, 99 S.Ct., at 2251).

"(T)he rationale of those cases (*Terry* and *Adams*) is not limited to situations where police officers have reason to believe that the individual may be armed." (Distr. Ct. Op., 469 F.Supp. at p. 500).

"The reasonableness of the officer's conduct must be measured by balancing the need for the stop against the gravity of the invasion of personal security entailed by the stop..." (469 F.Supp at p. 501)

The District Court opinion continues to reiterate the *Terry-Adams* concepts of "brief detention", "minimal intrusion", "*Terry*-style stop", "brief investigatory stop", and partial circumvention of probable cause requirements (*e.g.*, "The *Terry* court did not intend that police could circumvent the probable cause requirement *completely*" - emphasis ours) [Opinion, 469 F.Supp., at pp. 501, 502, 503]

"(T)he police conduct at issue here involved a proper progression of escalating responses to circumstances which generated a mounting degree of suspicion that a crime had occurred." (469 F.Supp. at 505)

The foregoing concepts are the core of the affirmance. They are contrary to *Dunaway:*

Prior to *Terry*,

"The standard (probable cause) applied to all arrests, without the need to 'balance' the interests and circumstances involved." ____ U.S. _____, 99 S.Ct. at 2254.

Terry approved a brief stop "only for the purpose of a pat-down for weapons" and subsequent cases were in the same category. *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2255-56.

"Respondent State now urges the Court to apply a balancing test, rather than the general rule, to custodial interrogations, and to hold that 'seizures' such as that in this case may be justified by 'reasonable suspicion'." *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2256.

"(R)espondents urge us to adopt a multi-factor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests." *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2257.

"(T)he police conduct in *Brown* fits equally the police conduct in this case: ... The detectives embarked upon this expedition for evidence in the hope that something might turn up ... 95 S.Ct. at 2262...." *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2258.

The decision is also contrary to *Dunaway* and to *Brown* (below) in that it confined the "admissibility of statements" to Fifth Amendment concepts, and did not consider the applicability of the Fourth Amendment thereto. *Thevis*, 469 F.Supp. at pp. 505-509, discussing *Miranda* and its progeny.

"The Court, in other words, appears to have held that the *Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible as long as, in the traditional sense, it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments." *Brown v. Illinois*, 422 U.S. 590, 597 (1975).

The District Court decision here was actually divided into two separate subjects: "1. Probable cause to arrest" (469 F.Supp. 500, et seq. - the Fourth Amendment question) and "2. Admissibility of defendants' statements" (469 F.Supp. 505, et seq. - the Fifth Amendment question).

Neither division of the opinion considered the coalescence of Fourth and Fifth Amendment rights.

"(A)lthough a confession after proper *Miranda* warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis *(Brown)*, 422 U.S. at 604, 95 S.Ct. 2262." *Dunaway*, ____ U.S. _____, 99 S.Ct. at 2259.

(2) The Court's opinion is not attenuated to the facts in the case:

The opinion of the District Court separated the facts it deemed applicable to "probable cause for arrest" (469 F.Supp. 500-504 - the Fourth Amendment question) from those it deemed applicable to "Admissibility of Defendants' Statements" (469 F.Supp. 505-509 - the Fifth Amendment question) (above). This separation of facts disregards chronology as well as integration. It is almost as if the Court were considering two separate cases. This factual re-casting is not only inconsistent with the *Dunaway* conclusion of their potential relationship (above); it is an artificial reconstruction, because the facts and events of the case were closely interrelated. The isolation and classification of these various facts for purposes of separately considering Fourth and Fifth Amendment rights is not attenuated to the fact structure. It is only a convenient way of making a (separate) Fourth and Fifth Amendment prognosis.

The opinion views Thevis' identity as one of the "ten most wanted" by the FBI; and of the large amount of cash involved in a bank transaction, as such sensational facts as would excuse a lack of

probable cause. However, neither fact had any relationship to the charge of possession of illegal weapons, which was the basis of the motions to suppress; and in fact, the police already knew that the bank transaction itself was free from criminal taint.

Respectfully,

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APPENDIX

EXHIBIT "C"

United States Court of Appeals
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of December, one thousand nine hundred and seventy-nine.

Present:
HONORABLE WILFRED FEINBERG
HONORABLE WALTER R. MANSFIELD
Circuit Judges
HONORABLE JACOB MISHLER
District Judge

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	79-1251
	)	79-1255
ANNA JEANETTE EVANS,	)	
MICHAEL GEORGE THEVIS,	)	
Defendants-Appellants.	)	
	)	

A petition for a rehearing having been filed herein by counsel for the Appellants.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro
Clerk

APPENDIX

EXHIBIT "D"

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of December, one thousand nine hundred and seventy-nine.

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. 79-1251
79-1255

ANNA JEANETTE EVANS,
MICHAEL GEORGE THEVIS,

Defendants-Appellants.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge